



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Cleta Mitchell, Esq.  
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Suite 500  
Washington, DC 20007

MAY 8 2010

RE: MUR 5879  
Harry Mitchell for Congress and John  
Bebbling, in his official capacity as treasurer;  
Democratic Congressional Campaign  
Committee and Jonathan S. Vogel, in his  
official capacity as treasurer

Dear Ms. Mitchell:

This is in reference to the complaint you filed on behalf of J. D. Hayworth for Congress with the Federal Election Commission ("Commission") on November 6, 2006, concerning Harry Mitchell for Congress and the Democratic Congressional Campaign Committee. Based on that complaint, the Commission found that there was reason to believe the Democratic Congressional Campaign Committee and its treasurer ("the DCCC") violated 2 U.S.C. §§ 434 (b) and 441a(a), provisions of the Federal Election Campaign Act of 1971, as amended, and instituted an investigation of this matter. The Factual and Legal Analysis explaining the Commission's reason to believe finding is enclosed.

On April 13, 2010, the Commission considered the matter, but was equally divided on whether to enter into conciliation with the DCCC. One or more Statements of Reasons explaining the Commission's decision will follow. On the same date, the Commission found that there is no reason to believe that Harry Mitchell for Congress and John Bebbling, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(a) and 434(b). Accordingly the Commission closed its file in this matter. The Factual and Legal Analysis explaining the Commission's decision with respect to the no reason to believe finding is enclosed.

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Harry Mitchell, *et.al.*  
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Documents related to the case will be placed on the public record within 30 days.  
See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files,  
68 Fed. Reg. 70,426 (Dec. 18, 2003).

The Federal Election Campaign Act of 1971, as amended, allows a complainant to  
seek judicial review of the Commission's dismissal of this action. See 2 U.S.C.  
§ 437g(a)(8).

If you have any questions, please contact me at (202) 694-1650.

Sincerely,



Ana Peña-Wallace  
Attorney

Enclosures  
Factual and Legal Analyses (2)

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS: Democratic Congressional Campaign  
Committee and Brian L. Wolff, in his official  
capacity as treasurer**

**MUR: 5879**

**I. INTRODUCTION**

This matter was generated by a complaint filed with the Federal Election Commission ("Commission") by counsel for J.D. Hayworth for Congress, *see* 2 U.S.C. § 437g(a)(1). Complainant alleges that the Democratic Congressional Campaign Committee ("DCCC") made an excessive in-kind contribution to Harry Mitchell for Congress ("Mitchell Committee"), which was Harry Mitchell's 2006 principal campaign committee for the U.S. House of Representatives for Arizona's Fifth Congressional District, in the amount of \$160,358.31 when it aired a television advertisement in support of, and featuring, federal candidate Harry Mitchell, and improperly reported the disbursement made in connection with the advertisement as an independent expenditure to the Commission. Complainant alleges that the DCCC's advertisement utilizes the same footage of Mitchell that the Mitchell Committee used in one of its own advertisements.

Because it appears that the Mitchell Committee produced the original footage that was used in the DCCC advertisement, the Commission finds reason to believe that the DCCC violated 2 U.S.C. §§ 434(b) and 441a(a) in connection with its republication of the video footage of the candidate.

**II. FACTUAL SUMMARY**

On October 31, 2006, the DCCC aired a television advertisement that included footage of Arizona Congressional candidate Harry Mitchell. Mitchell appears in at least three frames of the advertisement, which references an endorsement Mitchell received from *The Arizona Republic*. The next day, on November 1, 2006, the Mitchell Committee aired a television advertisement that appears to include the same footage of Mitchell that the DCCC used in the advertisement that aired 24 hours earlier, and also references the endorsement of Mitchell by *The Arizona Republic*. The overlapping content appears to consist of three screen shots that include identical footage of Mitchell, but display slightly different text on the screen.<sup>1</sup> See Complaint, Ex. 1

The complaint alleges that the DCCC disseminated a public communication that resulted in the DCCC's making of an excessive contribution to the Mitchell committee. To support the allegations, the complaint notes that the DCCC and the Mitchell Committee both used the same video footage in two separate television advertisements that aired within 24 hours of each other and that the candidate was featured prominently in several scenes in the advertisements. Complaint at 2 and Ex. 1. A press report attached to the complaint indicates that a Mitchell Committee representative publicly acknowledged that "[the Mitchell Committee] shot the footage some time ago and placed it on an internet server, making it available to anyone."<sup>2</sup> Complaint, Ex. 2.

<sup>1</sup> The complaint attached screen shots of three frames from the DCCC and Mitchell Committee advertisements. These screen shots confirm that each used the same video footage featuring Harry Mitchell. Complaint, Ex. 1. The Mitchell campaign's television advertisement is still available on its website, along with another advertisement utilizing much of the same footage. See <http://mitchell2006.com/Videos.asp> (last visited August 13, 2007). However, the DCCC's television advertisement could not be located through publicly available sources.

<sup>2</sup> It is unclear whether this representative was referring to the raw footage of the candidate used in both advertisements, or the resulting advertisement produced by the Mitchell Committee.

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1 In its response to the complaint, the DCCC refers to the possible "visual or thematic  
2 similarity" of the advertisements, but fails to discuss any details of the footage, including the  
3 source of the footage. The DCCC denies that the advertisement was coordinated with the  
4 Mitchell campaign and explains that the advertisement was produced through its independent  
5 expenditure program, which worked behind a firewall that was intended to prevent "access to  
6 information about candidate plans, projects, activities or needs." DCCC Response at 2. In an  
7 affidavit attached to the DCCC response, the Chief Operating Officer of the DCCC explained  
8 that during the 2006 election cycle, the DCCC adopted written procedures that it called the  
9 "wall" that were "designed to ensure that nonpublic information about a campaign's plans,  
10 projects, activities or needs would not be conveyed to those involved in preparing and  
11 distributing the DCCC's independent expenditures." Habershaw Aff. ¶ 2. Those written  
12 procedures were distributed to all staff and were also available for review by staff on the DCCC's  
13 computer system. *Id.* ¶ 5. Under its firewall procedures, individuals assigned to the DCCC's  
14 independent expenditure program were prohibited from having contact with campaigns and  
15 agents of those campaigns "who would benefit from the independent expenditures" and from  
16 discussing those campaigns with DCCC staff outside of the independent expenditure program.  
17 *Id.* ¶ 3. The DCCC's firewall procedures also limited access to the DCCC's general files and  
18 required vendors to comply with the procedures as well. *Id.* ¶ 4.

19 **III. ANALYSIS**

20 The Commission's regulations state that the republication of any broadcast or other form  
21 of campaign materials prepared by the candidate's authorized committee shall be considered a  
22 contribution for the purposes of contribution limitations and reporting responsibilities of the

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1 person making the expenditure. 11 C.F.R. § 109.23. Commission regulations also set forth a  
2 number of uses of campaign materials that do not constitute a contribution to the candidate, such  
3 as the dissemination of campaign materials done using a committee's coordinated party  
4 expenditure authority.<sup>3</sup> 11 C.F.R. § 109.23(b). However, such dissemination must not exceed  
5 the coordinated party expenditure limits of the Federal Election Campaign Act of 1971, as  
6 amended ("the Act"). 2 U.S.C. § 441a(d).

7 Based on the Mitchell Committee's public admission that it created the original campaign  
8 footage the DCCC used in its advertisement and the similarity of the footage used in both  
9 advertisements, it appears that the DCCC republished Mitchell's campaign materials, resulting in  
10 an in-kind contribution to the Mitchell Committee unless the DCCC used its coordinated party  
11 expenditure authority. 11 C.F.R. § 109.23. However, it does not appear that the DCCC used its  
12 coordinated party expenditure authority because it claims it created the advertisement  
13 independently. Given the cost of the advertisement (i.e., over \$196,000), the DCCC may have  
14 made an excessive in-kind contribution of approximately \$190,000. Even if the DCCC did use  
15 its coordinated party expenditure authority, it still would have made an excessive contribution  
16 because the applicable coordinated party expenditure limit on behalf of the Mitchell Committee  
17 was \$39,600. See 2 U.S.C. § 441a(a)(2)(A), 441a(d)(3)(B); *Price Index Increases for*

<sup>3</sup> The exceptions include the following: 1) the campaign material is disseminated, distributed, or republished by the candidate or the candidate's authorized committee who prepared that material; 2) the campaign material is incorporated into a communication that advocates the defeat of the candidate that prepared that material; 3) the campaign material is disseminated, distributed, or republished in a news story, commentary, or editorial exempted under 11 C.F.R. § 100.73 or 11 C.F.R. § 100.132; 4) the campaign material used consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of his own view; or 5) a national political party committee or a State or subordinated political party committee pays for such dissemination of campaign materials using coordinated party expenditure authority under 11 C.F.R. § 109.32.

- 1 *Coordinated Party Expenditure Limitations*, 71 Fed. Reg. 14218 (March 21, 2006).<sup>4</sup> In  
2 disseminating, distributing, or republishing Mitchell's campaign footage, the DCCC made an  
3 excessive in-kind contribution to the Mitchell Committee and failed to properly report the  
4 communication as a contribution in its reports to the Commission. Therefore, the Commission  
5 finds reason to believe that the DCCC violated 2 U.S.C. § 441a(a) and 2 U.S.C. § 434(b).

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<sup>4</sup> The Act requires the Commission to adjust the coordinated party expenditure limits set forth in section 441a(d) annually to account for increases in the consumer price index. Political party committees have separate limits for each candidate. The applicable limits in effect for House candidates in 2006 were calculated by multiplying the base figure of \$10,000, set forth in section 441a(d), by the price index (3.961), yielding a limit of \$39,600 that a political party committee could spend on the general election campaign of a federal candidate for the House of Representatives. See 2 U.S.C. § 441a(e); *Price Index Increases for Coordinated Party Expenditure Limitations*, 71 Fed. Reg. 14218 (March 21, 2006).

**FEDERAL ELECTION COMMISSION**  
**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** Harry Mitchell for Congress and MUR: 5879  
John Bebbling, in his official capacity as  
Treasurer  
Democratic Congressional Campaign  
Committee and Jonathan S. Vogel,  
in his official capacity as treasurer

**I. INTRODUCTION**

This matter was generated by a complaint filed with the Federal Election Commission ("the Commission") by counsel for J.D. Hayworth for Congress, *see* 2 U.S.C. § 437g(a)(1), alleging that the Democratic Congressional Campaign Committee ("DCCC") and Harry Mitchell for Congress ("Mitchell Committee") coordinated a DCCC television advertisement featuring Harry Mitchell that aired on October 31, 2006. The advertisement used video footage of Mitchell that was also used in a separate Mitchell Committee advertisement that aired twenty-four hours later, on November 1, 2006. Both advertisements addressed an *Arizona Republic* endorsement of Mitchell. The video footage at issue depicted Mitchell interacting with constituents, included shots of Mitchell directly facing the camera, and comprised approximately fifty percent (50%) of the DCCC's television advertisement. The DCCC reported the advertisement in question as an independent expenditure.

In response to the complaint, both the DCCC and the Mitchell Committee denied that there was any coordination. As explained below, the Commission does not have sufficient information to establish that there was any coordination between the committees in connection with the DCCC advertisement. Therefore, the Commission finds no reason to believe that the Mitchell Committee violated 2 U.S.C. §§ 434(b) and 441a(f).



**II. FACTUAL SUMMARY**

On October 31, 2006, the DCCC aired a 30-second television advertisement that included footage of Arizona Congressional candidate Harry Mitchell. Mitchell appears in half of the DCCC's advertisement, which references an endorsement Mitchell received from *The Arizona Republic*. The next day, on November 1, 2006, the Mitchell Committee aired a television advertisement that included the same footage of Mitchell that the DCCC used in the advertisement that aired 24 hours earlier, and also references the endorsement of Mitchell by *The Arizona Republic*. The overlapping content appears to consist of identical footage of Mitchell, but display slightly different text on the screen.

The complaint alleges that the Mitchell campaign was materially involved in the production of the DCCC advertisement. To support the allegations, the complaint notes that the DCCC and the Mitchell Committee both use the same video footage in two separate television advertisements that aired within 24 hours of each other. Complaint at 2 and Ex. 1. The complaint also asserts that several scenes in the advertisements "were clearly produced in a manner that would necessarily have required Harry Mitchell's material involvement" because he was featured prominently in those scenes. Complaint at 2.

The Commission examined the production of the DCCC advertisement titled "Compare," including how the DCCC obtained the footage of Mitchell used in the advertisement. The "Compare" ad was developed in response to the *Arizona Republic*'s unprecedented endorsement of Mitchell, published on October 27, 2006. There was an urgency to prepare an advertisement to take advantage of the endorsement because it was only a few days before the election. The investigation revealed that the Mitchell Committee provided the DCCC with a copy of the raw video footage used in "Compare" (which was filmed by the Mitchell Committee on September 6

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1 and 8, 2006 at various locations in Arizona for use in its own campaign advertisements) without  
2 charge, via the Mitchell Committee's media vendor, Adelstein Liston, on October 27, 2006, the  
3 day the *Arizona Republic* endorsement was made public and ten days before the general  
4 election.<sup>1</sup> After obtaining the footage, the DCCC then sent the video footage to its media  
5 vendor, McMahon Squier and Associates ("McMahon"), who was responsible for producing the  
6 advertisement.<sup>2</sup> The cost of the "Compare" ad was approximately \$427,485.25 (\$5,923.43 for  
7 the cost of production and \$421,561.82 for the media buy to air the advertisement).

8 Since 2003, the DCCC has maintained a library containing video footage, images, and  
9 other media from which to draw upon for various uses. The DCCC reportedly developed a  
10 practice of periodically requesting materials from Democratic members of Congress and  
11 Democratic candidates at the start of the election cycle, and of following up with a letter or  
12 phone calls if there is no response to the initial request. The DCCC typically ceased updating the  
13 media library after the final primary election was held. The DCCC explained that once the  
14 decision was made to prepare an advertisement utilizing the endorsement a written request for  
15 video footage of Mitchell from its library would have been completed. The DCCC could not

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<sup>1</sup> The Mitchell Committee's media vendor sent packages to the DCCC on September 22, 2006 and October 27, 2006. The FedEx package sent to the DCCC on October 27, 2006 was addressed to Kevin Lewis, the Assistant to the DCCC's Chief Operating Officer, who was responsible for collecting candidate footage for the DCCC's media library. In contrast, the FedEx package sent on September 22, 2006 was addressed to Christina Reynolds, the DCCC's Research Director. Per the DCCC's internal firewall procedures, Reynolds would have been prohibited from having contact with the Independent Expenditure unit, so the footage used for the advertisement should not have been sent to her. Further, the label on the beta tapes that the DCCC provided to the Commission containing the Mitchell Committee's raw footage have a date stamp of 10/27/2006. Based on this information, it is reasonable to conclude that the footage was sent on October 27, 2006.

<sup>2</sup> Three tapes were sent to the DCCC and portions of two of the three were used in "Compare." The first tape was entitled "Firefighters" and was 26 seconds long. Footage from this ad which primarily showed Mitchell from behind and was not used in "Compare." The second tape, entitled "Outdoors" contained 1 minute and 38 seconds of footage of Mitchell talking to people at a park. The third tape, entitled "Porch," was 46 seconds long and featured footage of Mitchell meeting with senior citizens. Portions of "Outdoor" and "Porch" were used in "Compare."

1 establish whether that procedure was followed in creating the "Compare" advertisement. The  
2 Commission obtained a copy of an "Audio Visual Media Library Request Form" requesting  
3 Mitchell footage. However, the date stamp at the bottom of the form was 12/18/2006.

4 The DCCC may have issued a general request for video footage from the Mitchell  
5 Committee for addition to the DCCC's video library in the ordinary course of business.  
6 However, as indicated above, it appears that the video footage used in the advertisements at issue  
7 here was not obtained in connection with any such general request. Although the Commission  
8 obtained electronic copies of over 200 letters sent to members of Congress requesting video  
9 footage and referencing "television advertising" as a possible use for such footage, it located no  
10 copies of any written requests sent to the Mitchell Committee.

11 The information obtained during the Commission's investigation has revealed that the  
12 video footage of Mitchell used in the "Compare" ad was not obtained from the video library  
13 pursuant to the policies implemented for obtaining such footage. Rather, it appears it was  
14 requested and obtained on October 28, 2006, the day after the *Arizona Republic* announced its  
15 endorsement of Mitchell. The Mitchell Committee placed no restrictions on the use of the  
16 footage when it sent copies to the DCCC.

17 **III. ANALYSIS**

18 The Mitchell Committee, which prepared the original video footage of the candidate,  
19 does not receive or accept an in-kind contribution, and is not required to report an expenditure,  
20 unless the dissemination, distribution, or republication of campaign materials is a coordinated  
21 communication. 11 C.F.R. § 109.23(a). The "Compare" ad met the payment and content prongs  
22 of the amended coordinated party communications regulations at 11 C.F.R. § 109.37 because the  
23 DCCC acknowledged paying for the ad and it was a public communication that referred to a

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1 clearly identified federal candidate and was disseminated 90 days or fewer before the candidate's  
2 election.<sup>3</sup> The information gathered appears to demonstrate that communications took place  
3 between the Mitchell Committee and the DCCC in connection with the footage used for the  
4 "Compare" ad, but that such communication falls short of meeting the conduct prong of the  
5 coordination regulation.

6 Information pertaining to the manner by which the DCCC obtained the Mitchell  
7 campaign footage for use in the creation of the "Compare" ad raises questions about whether the  
8 conduct prong of the coordination standard is met through the candidate's material involvement  
9 in the advertisement.<sup>4</sup> See 11 C.F.R. § 109.21(d)(1) and (2). A communication meets the  
10 "material involvement" conduct standard if a candidate, authorized committee, or political party  
11 committee is materially involved in decisions regarding the (1) the content of a communication,  
12 (2) the intended audience for the communication, (3) the means or mode of the communication,  
13 (4) the specific media outlet used for the communication, (5) the timing or frequency of the  
14 communication, or (6) the size or prominence of a printed communication, or duration of a  
15 communication by means of broadcast, cable, or satellite. See 11 C.F.R. § 109.21(d)(2). The  
16 "material involvement" standard "focuses . . . on the nature of the information conveyed and its  
17 importance, degree of necessity, influence or the effect of involvement by the candidate,

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<sup>3</sup> The D.C. Circuit's recent decision affirming the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications does not impact the analysis in this matter. See *Shays v. F.E.C.*, 528 F.3d 914, (D.C. Cir. 2008).

<sup>4</sup> None of the conduct standards are met if a political committee has established and implemented a firewall that meets the requirements of 11 C.F.R. § 109.21(h). However, the safe harbor does not apply if specific information indicates that, despite the firewall, information about the candidate's or political party committee's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication. 11 C.F.R. § 109.21(h).

1 authorized committee, political party committee, or their agents in any of the communication  
2 decisions.” 68 Fed. Reg. at 433.

3 The information gathered shows that immediately after the October 27, 2006 *Arizona*  
4 *Republic* endorsement, the DCCC staff assigned to the Mitchell/Hayworth race concluded that  
5 the endorsement was “unprecedented” and they “urgently” sought to capitalize on it with an  
6 advertisement. Further, it appears that on the day the endorsement was published, footage date  
7 stamped 10/27/2006 was shipped “priority overnight” by Federal Express from the Mitchell  
8 Committee’s media vendor to the DCCC. The Mitchell Committee footage delivered on October  
9 28, 2006 comprised the only footage of Harry Mitchell used in the DCCC’s “Compare”  
10 advertisement broadcast on October 31, 2006.

11 There is no evidence of coordination on the content of the communication itself (other  
12 than the acquisition of the footage). The discovery indicates that the three tapes were sent to the  
13 DCCC and that portions of two of the three were used in “Compare.” The first tape was entitled  
14 “Firefighters” and was 26 seconds long. Footage from this ad which primarily showed Mitchell  
15 from behind and was not used in “Compare.” The second tape, entitled “Outdoors” contained 1  
16 minute and 38 seconds of footage of Mitchell talking to people at a park. The third tape, entitled  
17 “Porch,” was 46 seconds long and featured footage of Mitchell meeting with senior citizens.  
18 Portions of “Outdoor” and “Porch” were used in “Compare.” While the volume of footage  
19 provided was certainly not extensive, the DCCC still had multiple choices from which to select.  
20 Further, although a portion of the footage chosen by the DCCC for inclusion in “Compare” was  
21 the same as that contained in one of the Mitchell Committee’s own advertisements, there is no  
22 specific information to suggest that the Mitchell Committee was involved in the process by  
23 which the DCCC selected that footage for inclusion in “Compare.” Finally, while it appears that

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1 at the very least the DCCC communicated an administrative request to the Mitchell Committee  
2 for footage of the candidate, there is no specific information suggesting that any communications  
3 relating to the request were substantive in nature or related to any "decision" regarding the  
4 advertisement including content, intended audience, means or mode of the communication,  
5 specific media outlet used, timing, frequency, or duration. To the contrary, as discussed earlier,  
6 representatives from each of the respondent committees have denied that communication took  
7 place between the DCCC's IE Unit and the Mitchell campaign.

8       The same facts that raise the issue of whether the material involvement conduct standard  
9 is met also gives rise to a discussion of whether the assent or suggestion conduct standard is met.  
10 11 C.F.R. § 109.21(d)(1) (stating that the communication is created, produced, or distributed at  
11 the request or suggestion of a candidate, authorized committee, or political party committee, or  
12 at the suggestion of a person paying for the communication, and the candidate, authorized  
13 committee, or political party committee assents to the suggestion). However, as the Commission  
14 explained in its Explanation and Justification for the coordination regulations, "[a] request or  
15 suggestion encompasses the most direct form of coordination, given that the candidate or  
16 political party committee communicates desires to another person who effectuates them."  
17 Explanation and Justification, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421,  
18 432 (Jan. 3, 2003). As discussed above in connection with the material involvement standard,  
19 there is no specific information that establishes that the communication regarding the  
20 advertisement was anything more than a generic request for footage. As a result, the "request or  
21 suggestion" conduct standard is not met here.

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**1           As a result, there does not appear to be information to establish coordination between the**  
**2   DCCC and the Mitchell Committee in connection with the advertisement. Accordingly, there is**  
**3   no reason to believe that the Mitchell Committee violated 2 U.S.C. §§ 441a(a) or 434(b).**

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